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Supreme Court of the United States

October Term, 1997

INNER CITY PRESS/COMMUNITY ON THE MOVE, BLACK CITIZENS FOR JUSTICE, LAW AND ORDER, THE DELAWARE COMMUNITY REINVESTMENT ACTION COUNCIL and RASHMI RANGAN,

Petitioners,

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Community Reinvestment Act's provision that "regulated financial institutions have [an] . . . obligation to help meet the credit needs of the local communities in which they are chartered" is irreparably undermined by a court's failure to consider that community-based organizations may have standing on their own behalf to challenge a regulatory agency's approval of a bank's application to expand under the Bank Holding Company Act?

PARTIES TO THE PROCEEDING BELOW

The parties before this Court are those set forth in the caption, as well as Banc One Corporation, Inc., which was granted leave to intervene by the United States Court of Appeals for the District of Columbia Circuit in an order dated June 26, 1997.

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PETITION FOR WRIT OF CERTIORARI

Inner City Press/Community on the Move, Black Citizens for Justice, Law and Order, the Delaware Community Reinvestment Action Counsel, and Rashmi Rangan respectfully petition for certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in *Inner City Press, et al. v. Board of Governors of the Federal Reserve System.*

OPINIONS BELOW

The Board of Governors of the Federal Reserve System (the "Board") issued an order ("Board Order") on May 14, 1997 approving the application of Banc One Corporation, Inc. of Columbus, Ohio to acquire First USA, Inc. of Dallas, Texas. The Board Order is reprinted in the Appendix hereto at 4a-20a. The opinion in *Inner City Press, et al. v. Board of Governors of the Federal Reserve System*, filed *per curiam*, is reported at 130 F.3d 1088, and is reprinted in the Appendix hereto at 1a-3a, and the order to that effect, filed December 12, 1997, is reprinted in the Appendix hereto at 21a-22a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

As the opinion of the Court of Appeals from which petitioners seek review was filed on December 12, 1997, this petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2901(a)(3) of the Community Reinvestment Act ("CRA"), 12 U.S.C §§ 2901, *et seq.*, provides, in relevant part,

that "regulated financial institutions have [a] continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered." (23a.)

The Bank Holding Company Act ("BCHA"), 12 U.S.C. §§ 1841, *et seq.*, incorporates this principle into the analysis required of the Board when it reviews bank applications to expand. Section 1842(c)(2) states, in pertinent part, that "[i]n every case, the Board shall take into consideration . . . the convenience and needs of the community to be served."

STATEMENT OF THE CASE

A. The Community Reinvestment Act

The purpose of the CRA is

> to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.

12 U.S.C. § 2901(a)(3). (23a.)

> By its terms, the CRA provides only that the [regulatory] agencies [such as the Board] must evaluate an institution's record of meeting the credit needs of the community, [and] that the agencies must take that record into account when considering an institution's application for permission to merge or expand. . . .

See Opinion Letter from Walter Dellinger, Department of Justice, to Eugene A. Ludwig, Comptroller of the Currency, December 15, 1994 ("Dellinger Letter") (attached as Exhibit 6 to Petitioners' Response to Respondents' Motions to Dismiss and Cross-Motion for Leave to Amend the Petition ("Response")). The denial of a bank application is the *only* mechanism through which the federal regulatory agencies can enforce the CRA. *See id.*

The CRA provides community residents with two avenues to ensure that banks serve the credit needs of their community. First, community groups may periodically comment on the extent to which a bank is meeting the credit needs of its community; such comments are reviewed by the regulators when conducting their periodic CRA examinations of the bank. A less than satisfactory CRA rating, however, has no effect in and of itself. The CRA is only enforced by the denial or imposition of conditions on banks' expansion applications. *See id.* Second, groups may file challenges to a bank's application to merge or expand, invoking the protection of the CRA and other relevant laws, such as the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, *et seq.*, and the Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801, *et seq.*

B. Organizational Petitioners ("petitioners")

Inner City Press/Community on the Move ("ICP"), a not-for-profit, community-based, consumer and civil rights organization, headquartered in New York and Delaware, *see* Affidavit of Matthew Lee, sworn to on September 10, 1997 ("Lee Aff.") at ¶3 (attached as Exhibit 2 to Response), is predominantly composed of Latino and African-American families and individuals who are seeking access to credit for housing, small businesses, and personal consumer needs. *Id.* ICP's officers and members spend a significant portion of their

time providing credit, mortgage and fair lending counseling and educational programs to individuals and community-based organizations in New York, Delaware, and other states, including Texas and Louisiana. *Id.* at ¶4. They also spend considerable time assessing the lending records of banks and mortgage companies in low-income neighborhoods of color, and monitoring mergers that would reduce access to credit for ICP's members and others in these communities. *Id.* at ¶9. The Board's failure to enforce the CRA, by approving mergers even though there are unresolved questions about a bank's fair lending oversight, procedures, and practices, creates an additional burden on ICP's already strained resources. *Id.* Furthermore, the Board's failure in this regard directly inhibits ICP's mission to assist those who have previously been locked out of the market for credit. *Id.* at ¶14.

Black Citizens for Justice, Law and Order ("BCJLO"), a not-for-profit organization based in Dallas, Texas, is concerned with fair lending and equal employment opportunity. Its members are primarily African-American individuals seeking equal access to credit, employment, and housing opportunities. BCJLO's members and staff spend a significant amount of time counseling other African-Americans who have been affected by discrimination in lending. *See* Affidavit of Nickie Christopher Charles, sworn to on September 9, 1997 ("Charles Aff.") at ¶9 (attached as Exhibit 3 to Response). The Board's failure to enforce the requirements of the CRA by not undertaking the appropriate investigation and assessment and by failing to adequately consider the data and comments submitted by BCJLO and other petitioners inhibits BCJLO's mission of helping to eradicate such discrimination. *Id.* at ¶¶12-13.

The Delaware Community Reinvestment Action Council ("DCRAC") is a coalition of groups and consumers in Delaware, who need and advocate for fair access to credit in their

communities. DCRAC's members and staff spend a significant amount of time assessing the community reinvestment and fair lending performance of banks located in Delaware, addressing individual complaints of discrimination in lending and credit extension, and fighting the discriminatory practices of banks that refuse to lend fairly in low-income and minority communities. *See* Affidavit of Rashmi Rangan, sworn to on September 9, 1997 ("Rangan Aff.") at ¶9 (attached as Exhibit 4 to Response). When the Board does not consider the CRA records of banks before approving mergers, DCRAC is compelled to spend even greater resources to assist its members in gaining access to credit, and to battle the ongoing discrimination in low- and moderate-income communities and communities of color. And, under such circumstances, because DCRAC has severely limited resources, it cannot continue to serve the same percentage of persons and groups seeking assistance that it had previously served. *Id.* at ¶17-18.

C. Intervenor-Respondent Banc One

Banc One Corporation, Inc. ("Banc One"), a bank holding company based in Columbus, Ohio, owns and manages a number of banks, Banc One Mortgage Corporation, and Banc One Financial Services, a large "subprime" lending subsidiary. Banc One and its subsidiaries are subject to the jurisdiction and regulation of the Board.

Prior to its acquisition by Banc One, First USA, Inc. ("First USA"), the fourth largest issuer of VISA and MasterCard credit cards in the nation, owned and controlled a bank, First USA Bank, and a thrift institution, both of which were headquartered in Wilmington, Delaware. Banc One acquired First USA, its bank, thrift institution, and credit card operation, as well as another unrelated institution, Liberty Bancorp.

D. Procedural History

On January 20, 1997, Banc One announced that it had signed an agreement to acquire First USA and its subsidiaries for over $7 billion. By doing so, Banc One would both expand its credit card operations, and its ability to market consumer finance credit products.

In early March 1997, Banc One applied to the Board to acquire First USA and its subsidiaries. Thereafter, on March 11, March 18, March 26, March 21, April 14, April 24, April 30, May 5, May 6, May 7, May 11 and May 13, 1997, petitioners submitted comments to the Board, raising factual questions regarding Banc One's applications, based, *inter alia*, on (1) Banc One's, Banc One Mortgage's and Banc One Financial Services' fair lending records; (2) Banc One's failure to comply with the CRA; and (3) the anti-competitive effects and lack of public benefits of the proposed acquisition.

In its May 14, 1997 Order, the Board approved Banc One's application to acquire First USA. (4a-20a.)

On June 12, 1997, petitioners filed a timely petition for review and moved the court below for an emergency stay, which motion was denied on June 27, 1997, the same day on which Banc One's acquisition of First USA was finalized.

On August 11, 1997, Banc One and the Board moved to dismiss the petition. The motion was granted on December 12, 1997. (21a-22a.) Like the Second Circuit Court of Appeals' decision in *Lee v. Board of Governors of the Federal Reserve System*, 118 F.3d 905 (2d Cir. 1997), the court below's decision did not address the issue of organizational standing. *See* 130 F.3d 1088 (D.C. Cir. 1997). (1a-3a.)

REASONS FOR GRANTING THE WRIT

The vitality of both the CRA and the principle that organizations can sue on their own behalf have been compromised by the court below's failure to analyze whether organizational petitioners had standing to challenge the Board's approval of Banc One's application to acquire First USA.

I.

UNLESS COMMUNITY-BASED ORGANIZATIONS HAVE JUDICIAL RECOURSE, A REGULATORY AGENCY'S FAILURE TO ENSURE THAT AN APPLICANT BANK COMPLIES WITH ITS CRA OBLIGATIONS WILL CAUSE LOW-INCOME COMMUNITIES AND COMMUNITIES OF COLOR TO SUFFER FROM THAT BANK'S DISCRIMINATORY PRACTICES.

The only tool intended by Congress to enforce the CRA is the regulatory agency's scrutiny of a bank's community lending record when a bank applies for permission to expand or merge, and the potential threat of a denial of the bank's application. *See* Dellinger Letter, Response at Exhibit 6. As the Department of Justice has made clear, Congress authorized sanctions only in the application context; federal financial supervisory agencies are barred from imposing other sanctions for a bank's "substantial noncompliance" with the CRA, such as administrative enforcement actions under 12 U.S.C. § 1818, which provides for cease-and-desist orders and monetary penalties. *Id.* Thus, in the absence of decisional authority explicitly permitting a private right of action under the CRA, the beneficiaries of this Act, low-income and minority consumers, must rely solely on the federal agencies' diligent enforcement of the Act's requirements as the means of implementing the policies and achieving the objectives articulated in the CRA.

Because the CRA can only be enforced by the regulators in the context of a bank's application, the only way the beneficiaries of the Act can ever have their grievances reviewed by a court is through a challenge to the regulators' approval of, or failure to condition a bank's application. *See* BHCA, 12 U.S.C. § 1848. To deny standing to organizations which fight for affected communities' right to equal credit access is to emasculate a citizen's right to benefits under the CRA, and thus thwart the CRA's provision that "regulated financial institutions have [an] . . . obligation to help meet the credit needs of the local communities in which they are chartered." 12 U.S.C. § 2901(a)(3). (23a.)

II.

FOR THE COURT BELOW TO CONCLUDE THAT PETITIONERS LACKED ARTICLE III STANDING, WITHOUT ACKNOWLEDGING THAT ORGANIZATIONS CAN SUE ON THEIR OWN BEHALF, IGNORES THE WELL-ESTABLISHED DOCTRINE OF ORGANIZATIONAL STANDING.

Courts have consistently recognized that organizational harm constitutes a sufficient basis for Article III standing. In 1982, this Court, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114 (1982), held that a non-profit community organization had standing to bring suit on its own behalf against a realty company for allegedly engaging in racially discriminatory steering practices in violation of the Fair Housing Act. The Court stated that the organization, HOME, had standing because the defendants' unlawful actions frustrated the organization's efforts to achieve equal access to housing:

> If, as broadly alleged, the petitioners' steering practices have perceptibly impaired HOME's ability

> to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities — with the consequent *drain on the organization's resources* — constitutes far more than simply a setback to the organization's abstract social interests. . . .

Id. at 379, 102 S. Ct. at 1124 (citation omitted) (emphasis added).

The Court reaffirmed these principles of organizational standing in *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 111 S. Ct. 2298 (1991); *see also Spann v. Colonial Village, Inc.*, 899 F.2d 24, 28 (D.C. Cir.) (the court accepted as concrete organizational injuries, the non-profit organization's allegations that: (1) the defendants' advertising practices had the effect of "encouraging discriminatory attitudes" which (2) "directly decreas[ed] the effectiveness of the [plaintiff's] efforts to educate the real estate industry" and the public about laws prohibiting discrimination in housing; and also (3) "necessitate[d] increased educational efforts to counteract the influence" of defendants' discriminatory acts), *cert. denied*, 498 U.S. 980, 111 S. Ct. 508 (1990); *Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994) (finding standing for non-profit fair employment organization to bring suit challenging discriminatory placement practices of an employment agency where the agency's actions "interfered with [FEC's community outreach, counseling, and research projects] and programs and . . . required the Council to expend resources to counteract BMC's alleged discrimination").

In the case herein, by failing to evaluate fully the applicant bank's compliance with the CRA, the Board has frustrated the organizational purposes of petitioners and their ability to promote equal access to credit. It has hindered the operation of a critical mechanism by which petitioners and other groups can help to make fair lending a reality. As a result, ICP, DCRAC, and BCJLO must expend greater efforts, energy, and resources to obtain mortgages, consumer credit, and other banking services for their members. *See* Lee Aff. at ¶¶13-14; Rangan Aff. at ¶¶17-18; Chance Aff. at ¶¶12-13.

Despite the above, the court below, like the court in *Lee v. Board of Governors of the Federal Reserve System*, inexplicably failed to consider whether petitioners had established organizational standing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED DECEMBER 12, 1997

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed December 12, 1997

No. 97-1394

INNER CITY PRESS, ET AL.,

PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

RESPONDENT

Appeal from the a Decision of the Board of Governors of the Federal Reserve System

On Motion to Dismiss

Matthew R. Lee and *Laura Davis,* for petitioners.

Katherine H. Wheatley and *Douglas B. Jordan* were on the motion to dismiss, for respondent.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appendix A

Before: WALD, SILBERMAN, and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed *PER CURIAM.*

PER CURIAM: We publish this opinion to emphasize that participation in administrative proceedings before the Board of Governors of the Federal Reserve System, like such participation before any agency, *see Reytblatt v. United States Nuclear Regulatory Comm'n,* 105 F.3d 715, 720 (D.C. Cir. 1997), does not, without more, satisfy a petitioner's Article III injury-in-fact requirement. This point has recently been the express holding of the Second Circuit in a case involving the same petitioners appearing here. *See Lee v. Board of Governors,* 118 F.3d 905, 911 (2d Cir. 1997) (dismissing petition for lack of standing, notwithstanding petitioner's participation in administrative proceedings).

The Bank Holding Act limits judicial review to "part[ies] aggrieved" by an act of the Board. *See* 12 U.S.C. § 1848. Petitioners must, therefore, satisfy statutory prudential standards as well as constitutional requirements. *See, e.g., Synovus Financial Corp. v. Board of Governors,* 952 F.2d 426, 432 (D.C. Cir. 1991) (because intervener faces realistic threat that its relocation proposal will be vetoed by State if Board's order is upheld, intervener is aggrieved and has standing); *Irving Bank Corp. v. Governors of the Fed. Reserve Sys.,* 845 F.2d 1035, 1039 (D.C. Cir. 1988) (noting that petitioner has standing to seek judicial review because it has a fiduciary duty to protect its shareholders from injury and also participated in agency proceedings). *See also Brotherhood of Locomotive Engineers v. United States,* 101 F.3d 718, 723 (D.C. Cir. 1997). *Of Martin-Trigona v. Federal Reserve Bd.,* 509 F.2d 363, 365-66

(D.C. Cir. 1974) (in a holding limited to the specific circumstances of that case, court dismissed petition for review brought by party who had participated in administrative proceedings before the Board, for failure to satisfy Article III standing requirements).

While petitioners may have satisfied prudential standing by virtue of their participation in the administrative proceedings, *see Jones v. Board of Governors*, 79 F.3d 1168 (D.C. Cir. 1996) (dismissing petition where petitioner had not participated before the Board, without addressing whether Article III standing had been satisfied), they have not demonstrated Article III standing. *See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 116 S. Ct. 1629, 1533 (1996) (three essential requirements for Article III standing are injury-in-fact; casual relationship between injury and challenged conduct; and redressability). Therefore, we grant the motion to dismiss.

APPENDIX B — ORDER APPROVING NOTICE TO ACQUIRE A SAVINGS ASSOCIATION AND TO ENGAGE IN CERTAIN NONBANKING ACTIVITIES

FEDERAL RESERVE SYSTEM

Banc One Corporation, Inc.
Columbus, Ohio

Order Approving Notice to Acquire a Savings Association and to Engage in Certain Nonbanking Activities

Banc One Corporation, Inc., Columbus, Ohio ("Banc One"), a bank holding company within the meaning of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval under section 4(c)(8) of the BHC Act (12 U.S.C. § 1843(c)(8)) and section 225.24(a) of the Board's Regulation Y (12 C.F.R. 225.24(a)) to merge with First USA, Inc., Dallas, Texas ("First USA"), and to acquire First USA's wholly owned subsidiary, First USA Federal Savings Bank, Wilmington, Delaware ("First USA FSB"). Banc One also has requested the Board's approval under section 4(c)(8) of the BHC Act to acquire the direct and indirect nonbank subsidiaries of First USA listed in the Appendix and thereby to operate nonbank depository institutions, and to engage in activities related to extending credit and data processing.[1]

Notice of the proposal, affording interested persons an opportunity to submit continents, has been published

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1. Banc One and First USA have granted each other an option to purchase up to approximately 19.9 percent of the outstanding common stock of the other company under certain circumstances. These options would terminate on consummation of the proposal. First USA would be required to obtain the Board's approval under section 3 of the BHC Act before exercising its option.

(62 *Federal Register* 11,895 (1997)).[2] The time for filing comments has expired, and the Board has considered the notice and all comments received in light of the factors set forth in section 4(c)(8) of the BHC Act.[3]

Banc One, with total consolidated assets of approximately $102 billion, is the tenth largest commercial banking organization in the United States. Banc One operates subsidiary banks: Arizona, Colorado, Illinois, Indiana, Kentucky, Louisiana, Ohio, Oklahoma, Texas, Utah, West Virginia, and Wisconsin, controlling approximately 2.7 percent of total banking assets in the United States.[4] Banc One also engages

2. Notice of the proposed acquisition of First USA FSB also was published in appropriate newspapers in accordance with the Board's policy regarding applications to acquire a savings association.

3. Commenters on the proposal, including Inner City Press/ Community on the Move, the Delaware Community Reinvestment Action Council, and the Black Citizens for Justice, Law & Order (collectively "Commenters") contend that the Board should not consider the substance of Banc One's submissions filed after time periods prescribed in the Board's Rules of Procedure for an applicant's response to comments. *See* 12 C.F.R. 262.3(e). The Board notes that both Banc One and Commenters filed information and comments after the period provided in the Board's Rules of Procedure. The Board has the sole discretion under its Rules of Procedure to consider comments ant responses, including late submissions of information. This notice was filed and many of the comments and responses were submitted before the effective date of the Board's recent revision to Regulation Y. Accordingly, in reviewing this proposal, the Board has considered all the submissions filed, including submissions filed by Commenters and by Banc One after the relevant time periods.

4. Asset and deposit data are as of December 31, 1996.

through its subsidiaries in a broad range of permissible nonbanking activities in the United States. First USA, with total consolidated assets of $10.2 billion, controls deposits of $1.7 billion in its subsidiary depository institutions.[5] After consummation of the proposal, Banc One would be the eighth largest commercial banking organization in the United States, with consolidated assets of $112.2 billion.

The Board has determined that operating a savings association by a bank holding company is closely related to banking for purposes of section 4(c)(8) of the BHC Act. The Board requires a savings association acquired by a bank holding company to conform its direct and indirect activities to those permissible for a bank holding company under section 4(c)(8) ant Regulation Y. Banc One has committed to conform all activities of First USA FSB to those requirements.[6]

The Board also has determined by regulation that operating nonbanking depository institutions and engaging in activities related to extending credit and data processing, as discussed in the Appendix, are closely related to banking within the meaning of section 4(c)(8) of the BHC Act. Applicant has committed to conduct these activities subject to the limitations set forth in Regulation Y.

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5. In this context, the term depository institution includes commercial banks, savings banks, and savings associations.

6. Banc One intends to merge First USA FSB with and into Banc One's subsidiary national bank, Bank One, Columbus, N.A, Columbus, Ohio. The merger is subject to the approval of Office of the Comptroller of the Currency ("OCC") under section 18(c) of the Federal Deposit Insurance Corporation Act (12 U.S.C. § 1828(c), the Bank Merger Act), and the Board has consulted with the OCC on the proposed merger.

Appendix B

Competitive Considerations

In order to approve the proposal, the Board also must determine that the performance of the proposed activities is a proper incident to banking, that is, that the proposed transaction "can reasonably be expected to produce benefits to the public . . . that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." As part of the Board's evaluation of these factors, the Board has carefully considered the competitive effects of the proposed transaction in light of all the facts of record, including comments contending that the proposal would have an adverse effect on competition in the credit card industry.

Banc One and First USA compete as issuers of credit cards and as merchant credit card processors.[7] Credit card issuers compete nationally for credit card customers. First USA is the fourth largest credit card issuer in the United States, controlling approximately 6.8 percent of outstanding credit card balances.[8]

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7. Merchant card processing consists of three primary activities: (1) merchant contract acquisition, (2) front-end network processing, and (3) back-end merchant accounting. Merchant contract acquisition includes the marketing and sale of card transaction processing services to merchants. Front-end network processing includes card authorization at the time of a purchase and the electronic capture of sales drafts. Back-end merchant accounting includes recording the number and amount of all sales drafts and credits submitted by each merchant, managing and reporting transaction information, resolving charge backs, and investigating fraudulent activity.

8. Market share is measured by the dollar amount of credit card balances outstanding as of December 31, 1996, and is based on data provided by the 50 largest issuers of Visa and MasterCard credit cards.

Appendix B

Banc One is the 11th largest credit card issuer, controlling approximately 3.1 percent of outstanding credit card balances. After consummation, Banc One would become the third largest credit card issuer, controlling approximately 10 percent of outstanding credit card balances. The market would remain unconcentrated as measured by the Herfindahl-Hirschman Index ("HHI"),[9] and numerous competitors would remain.[10]

Merchant credit card processors also compete nationally. First USA is the third largest merchant credit card processor, with approximately 7.3 percent of the total credit and debit transactions processed, and Banc One is the tenth largest processor, with approximately 2.7 percent of the total credit and debit transactions processed.[11] After consummation, Banc

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9. The HHI would increase 42 points to 642. Under the revised Department of Justice guidelines, 49 *Federal Register* 26,823 (June 29, 1984), a market in which the post-merger HHI is less than 1000 is considered unconcentrated, and a market in which the post-merger HHI is between 1000 and 1800 is considered moderately concentrated. The Justice Department generally will not challenge an acquisition (in the absence of other factors indicating anticompetitive effects) unless the post-merger HHI is at least 1800.

10. Commenters contend that the market for credit card issuers is too concentrated and that credit card issuers are able to charge higher than normal interest rates. If the competitive effect of the proposal were considered only with respect to the eleven largest credit card issuers (Banc One is the 11th largest credit card issuer), The proposal still would be within the DOJ merger guidelines. The post-merger HHI would increase by 88 points to 1176, and Banc One would control approximately 14.4 percent of the outstanding credit card balances.

11. Market share is measured by the dollar amount of Visa and MasterCard credit and debit transactions processed by the 75 largest firms in 1996.

Appendix B

One would become the third largest processor, controlling approximately 10 percent of the total credit and debit transactions processed. Market concentration as measured by the HHI would remain moderately concentrated,[12] and numerous competitors would remain.

Based on all the facts of record, the Board concludes that consummation of this proposal would not have a significantly adverse effect on competition among credit card issuers or merchant credit card processors, or in any other relevant market.

Other Considerations

As part of its evaluation of the public interest factors, the Board has carefully reviewed the financial and managerial resources of Banc One, First USA, and their subsidiaries, and the effect the transaction would have on such resources in light of all the facts of record.[13] The facts of record include confidential financial information from Banc One and reports of examination and other supervisory information received from the primary federal and state supervisors of the organizations assessing the financial and managerial resources of the organizations. Based on all the facts of record, the Board concludes that the financial and managerial resources of the organizations involved in this proposal are consisted with approval.[14]

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12. The HHI would increase by 40 points to 1013 as a result of the proposal.

13. The Board has carefully reviewed the effect of the downward revision of earnings recently announced by First USA on the financial considerations of the proposal. The Board concludes that the revision would not have a materially adverse effect on the financial resources of Banc One.

14. Commenters contend that an anonymously written (Cont'd)

Appendix B

In acting on applications to acquire a savings association, the Board has traditionally reviewed the records of performance by the institutions involved under the Community Reinvestment Act (12 U.S.C. § 2901 *et seq.* ("CRA")).[15] Commenters have

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(Cont'd)
employee newsletter provides evidence of unfair and discriminatory labor practices at a subsidiary of First USA. In addition, some commenters contend that service by a senior First USA executive as a director of an unaffiliated subprime lender that recently reorganized in a bankruptcy proceeding raises adverse managerial considerations. The comments do not provide facts that indicate wrongdoing by the executive. One commenter also generally alleges that the numbers of African Americans in management positions at Banc One and First USA are disproportionately low.

As noted, the Board reviewed these comments in light of all the facts of record, including supervisory assessments of the financial and managerial resources of Banc One and relevant First USA subsidiaries, and concluded that financial and managerial considerations are consistent with approval. The Board also previously has stated that its limited jurisdiction to review applications under the BHC Act does not authorize the Board to adjudicate disputes involving an applicant that arise under statutes, other than banking laws, that are administered and enforced by another federal regulatory agency. *See, e.g., Norwest Corporation*, 82 Federal Reserve Bulletin 580 (1996); *see also Western Bancshares v. Board of Governors*, 480 F.2d 749 (10th Cir. 1973). Banc One and First USA are required to file an annual report with the Equal Employment Opportunity Commission ("EEOC") covering all employees in its corporate structures under the Department of Labor's regulations. *See* 41 C.F.R. 60-1.7(a) and 60-1.4. The Department of Labor, and the EEOC in particular, have sufficient statutory authority to address disputes regarding unfair or illegally discriminatory labor practices.

15. Banc One contends that recent changes in laws other than
(Cont'd)

criticized aspects of the CRA performance records of both institutions and the record of compliance with fair lending laws by Banc One. The Board has considered in detail almost identical comments relating to Banc One in connection with its proposal to acquire Liberty Bancorp, Inc., Oklahoma City, Oklahoma.[16]

(Cont'd)
the CRA have made the CRA, by its terms, inapplicable to the acquisition of a savings association by a bank holding company. Section 2203 of the Economic Growth and Regulatory Paper Reduction Act of 1996 ("section 2203") eliminated the requirement for approval by the Office of Thrift Supervision ("OTS") of acquisitions of savings associations by bank holding companies. There is no indication that section 2203 was intended to alter the applicability of the CRA. First USA FSB is an insured depository institution that is subject to evaluation under the CRA. Banc One's contention also is inconsistent wide the Board's long-standing policy of considering the CRA record of bank holding companies in reviewing applications by bank holding companies to acquire savings associations. In this light, the Board concludes that the language and intent of the CRA support taking CRA performance into account in an application by a bank holding company to acquire a savings association such as First USA FSB.

16. *Banc One Corporation*, 82 Federal Reserve Bulletin — (1997) (Order dated April 28, 1997) ("Banc One/Liberty Orders"). The Board has carefully reviewed additional contentions by Commenters that Banc One's 1996 HMDA data show: (1) disparities in denial rates to minorities compared to the denial rates for nonminority borrowers; (2) significant HMDA reporting errors by Banc One, particularly Banc One Financial Services ("BOFS"); and (3) misrepresentations of Banc One's referral program among its affiliates, including loan purchases by BOFS. The Board has reviewed the 1996 HMDA data and Banc One's overall CRA performance record in light of these allegations and the limitations noted in the Banc One/Liberty Order that make HMDA data an inadequate basis,
(Cont'd)

Appendix B

Based on all the facts of record, including the facts and reasons discussed in the Banc One/Liberty Order, which are specifically incorporated herein by reference, the Board concludes that Banc One's record of performance under the CRA and record of compliance with fair lending laws are consistent with approval of the proposal.[17]

First USA FSB commenced operations in 1996, and has not yet been evaluated for CRA performance by the Office of Thrift Supervision, its primary federal supervisor. As noted, Banc One intends to merge First USA FSB with and into its

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absent other information, for concluding that an institution has engaged in illegal lending discrimination. The Board also has considered Commenters' allegations about the accuracy of Banc One's HMDA data, particularly data from BOFS. The Board notes that BOFS accounts for less than 1 percent of Banc One's consolidated net income, and that the Board has sufficient supervisory authority to address inaccuracies in HMDA reporting by BOFS or other Banc One nonbank affiliates if the reports are found to contain inaccuracies. The Board also has considered the contention that alleged HMDA inaccuracies would constitute a misrepresentation of Banc One's referral program in light of Banc One's managerial record and the Board's long experience with supervising the organization. Accordingly, and as explained in the Banc One/Liberty Order, Banc One's overall performance records under the CRA and fair lending laws, including the most recent CRA performance exarnination ratings of its subsidiary banks, and Banc One's history of addressing areas of weakness in its performance, are consisted with the Board's approving an application under the BHC Act.

17. As noted, the Board has also considered these allegations and Banc One's record of performance in evaluating managerial factors.

lead subsidiary bank, Bank One, Columbus, N.A., Columbus, Ohio ("Columbus Bank"), which received an "outstanding" rating at its most recent CRA performance evaluation from the bank's primary federal supervisor, the OCC. First USA's other insured depository institutions, First USA Bank and First USA Financial Services, Inc., received "satisfactory" ratings for CRA performance from their primary federal supervisor, the Federal Deposit Insurance Corporation ("FDIC"), as of August 1996 and September 1996, respectively.[18]

Based on all the facts of record, and for the reasons discussed above and in the Banc One/Liberty Order, the Board concludes that considerations relating to the CRA performance records of the institutions involved are consistent win approval of die proposals.[19]

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18. A customer of First USA Bank contends that the bank breached its credit card agreement and has violated Truth in Lending Act requirements. The FDIC, the primary supervisor of First USA Bank, is addressing the customer's complaint. The Delaware Community Reinvestment Action Council contends First USA Bank's most recent CRA evaluation reflects substantial assistance from First USA FSB. Banc One responds that, after the merger of First USA FSB into Columbus Bank, First USA Bank would continue to assist in meeting the credit needs of its communities through qualified investments or through the assistance of Banc One affiliates such as Banc One Community Development Corporation.

19. Commenters requested additional time in which to comment on 1996 data filed by Banc One under the Home Mortgage Disclosure Act (12 U.S.C. § 2801 *et seq.*) ("HMDA"). Based on all the facts of record, including the fact that Commenters did not request the 1996 HMDA data from Banc One, and that Banc One voluntarily provided the information to Commenters, the Board concludes that Commenters' request for additional time to file continent was

(Cont'd)

Appendix B

The record indicates that consummation of the proposal would result in benefits to both consumers and merchants. The proposal would enable Banc One to provide First USA customers with access to a broad range of services. In addition, combined credit card operations of Banc One and First USA would enhance the services and products currently provided by each of these organizations. Additionally, there are public benefits to be derived from permitting capital markets to operate so that bank holding companies may make potentially profitable investments in nonbanking companies when those investments are consistent, as in this case, with the relevant considerations under the BHC Act, and from permitting banking organizations to allocate their resources in the manner they believe is most efficient. Based on all the facts of record, the Board has determined that consummation of this proposal can reasonably by expected to produce public benefits that would outweigh any likely adverse effects under the proper incident to banking standard of section 4(c)(8) of the BHC Act.

Request for a Hearing

Commenters contend that their allegations raise issues of disputed material facts and that a hearing is necessary in order for commenters to obtain and to provide additional information relevant to their allegations, particularly regarding Banc One's record of CRA performance and compliance by Banc One's nonbanking subsidiaries with fair lending laws. Commenters also cite the examination of Banc One Mortgage Company

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properly denied. *See, e. g,* the Board's Regulation C (12 C.F.R. Part 203) on disclosure of HMDA data. The Board also notes that Commenters have provided substantial submissions on the 1996 HMDA data that have been considered as part of this proposal.

("BOMC"), a nonbank subsidiary of Banc One, which was discussed in the Banc One/Liberty Order, as evidence of disputed material facts. The Board's rules provide for a hearing on notices under section 4 of the BHC Act to acquire a savings association if there are disputed issues of material fact relating to the acquisition of the savings association that cannot be resolved in some other manner. *See* 12 C.F.R. 225.25(a)(2).

After a careful review of all the facts of record, the Board has concluded that Commenters' arguments amount to a dispute with the weight that should be accorded to, arm the conclusions that the Board should draw from, the facts of record, but do not identify disputed issues of fact that are material to the Board's decision. In addition, interested parties have had an opportunity to present their views, and commenters have submitted substantial written comments that have been considered by the Board. Commenters' request fails to show why a written presentation would not suffice and to summarize what evidence would be presented at a hearing or meeting. See 12 C.F.R. 262.3(e).

The examination discussed in the Banc One/Liberty Order is intended to resolve a question about fair lending oversight, procedures and practices at Banc One Mortgage Company ("BOMC") based on certain preliminary information that was developed in the course of the Board's supervision of Banc One and on other complaints against Banc One's operations. The Board fully expects that Banc One will take all necessary steps, including adopting and implementing practices and procedures developed in consultation with the Board, to ensure that any areas of weakness in its fair lending policies and practices that may be identified through the Board's examination are adequately addressed, and the Board conditions its action

on this proposal on Banc One taking such actions. Based on all the facts of record, including the fact that BOMC accounts for less than 1 percent of Banc One's consolidated net income, the fact that the Board has supervisory authority to require bank holding companies and their subsidiaries to address compliance deficiencies, Banc One's record of addressing supervisory and other issues identified by its supervisor, the condition stated in this order, and Banc One's overall record of performance under the CRA and fair lending laws, the Board does not believe that completion of the BOMC examination, or receipt of additional information at a public hearing or meeting, would provide facts material to the Board's consideration of the proposal at this time.

On the basis of all the facts of record, the Board has determined that a public hearing or public meeting is not required or necessary to clarify the factual record in this proposal, or otherwise warranted in this case. Accordingly, the request for a public hearing or meeting on the proposal is hereby denied.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the notice should be, and hereby is, approved. The Board's approval of the proposal is specifically conditioned on compliance by Banc One with the commitments made in connection with this notice and conditions referred to in this order.[20] The Board's determination also is subject to all

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20. Commenters also have requested that the Board delay action on the proposal and investigate its allegations against Banc One and its nonbanking subsidiaries through an on-site examination. Based on all the facts of record, and for the reasons discussed in the Banc (Cont'd)

the conditions in Regulation Y, including those in sections 225.7 and 225.23(g) (12 C.F.R. 225.7 and 225.23(g)) and to the Board's authority to require such modification or termination of the activities of a holding company or any of its subsidiaries as the Board finds necessary to assure compliance with, or to prevent evasion of, the provisions and purposes of the BHC Act and the Board's regulations and orders issued thereunder. The commitments and conditions relied on by the Board in reaching this decision shall be deemed to be conditions imposed in writing by the Board in connection with its findings and decision, and, as such, may be enforced in proceedings under applicable law.

This transaction shall not be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or the Federal Reserve Bank of Cleveland, acting pursuant to delegated authority.

By order of the Board of Governors,[21] effective May 14, 1997.

s/ Jennifer J. Johnson
Jennifer J. Johnson
Deputy Secretary of the Board

(Cont'd)
One/Liberty Order which, as noted, have been specifically incorporated herein, the Board concludes that delay or denial of the proposal until the Board investigates Commenters' allegations or completes its examination of BOMC is not warranted.

21. Voting for this action; Vice Chair Rivlin and Governors Kelley, Phillips, and Meyer. Absent and not voting: Chairman Greenspan.

Appendix B

APPENDIX

Nonbanking Subsidiaries

Banc One proposes to acquire all of the voting shares of the following nonbanking subsidiaries of First USA:

(a) First USA Bank, Wilmington, Delaware, a credit card bank, and thereby engage in making revolving extensions of credit in connection with the issuance of its consumer credit cards, and conducting activities incidental to its credit card business, pursuant to section 225.28(b)(2);

(b) First USA Financial Services, Inc., Murray, Utah, an industrial loan company, and thereby engage in making extensions of credit in connection with the issuance of commercial credit cards to businesses, governmental units and other entities, pursuant to sections 225.28(b)(2) and 225.28(b)(4);

(c) First USA Merchant Services, Inc., Dallas, Texas, and thereby engage in processing credit and debit card transactions for merchants directly and indirectly through financial institutions and independent sales organizations, including card transaction authorization ("authorization"), processing of card transactions ("capture"), settlement of card transactions ("resettlements"), and arranging for deposit of funds in merchants' accounts ("merchant funds deposit"), pursuant to sections 225.28(b)(2) and 225.28(b)(14);

(d) First USA Technology, Inc., Dallas, Texas, and thereby engage in serving as licenser for software provided to merchants in connection with credit and debit card

processing activities, pursuant to sections 225.28(b)(2) and 225.28(b)(14);

(e) First Virtual Holdings Incorporated, San Diego, California, and thereby engage in providing merchants selling their products and services over the Internet with a payment system that verifies the identity of the purchaser and the seller to a credit card transaction, and engage in providing processing services, including authorization, capture, settlement, and merchant funds deposit activities for the credit card transaction; and operating a shared website on the Internet for sellers of information products by managing all aspects of the selling process such as confirmation of purchases, distribution of information products, accounting, settlement, and collection and payment of proceeds, pursuant to section 225.28(b)(14);

(f) Gensar Technologies, Inc., Tampa, Florida, and thereby engage in providing certain credit and debit card transaction processing services and equipment for merchants directly and indirectly through financial institutions and independent sales organizations, and acting as licensor of personal computer-based software designed for the processing of financial data, pursuant to sections 225.28(b)(2) and 225.28(b)(14);

(g) Merchant Link, Inc., Bethesda, Maryland, and thereby engage in providing specialized help-desk services only in connection with the operation of the bank card modules of certain integrated hotel, restaurant, and retail financial management systems, pursuant to section 225.28(b)(14); and

(h) Paymentech New Hampshire, Inc., Salem, New Hampshire, and thereby engage in providing specialized credit and debit card transactions processing services, including authorization, capture, settlement, and merchant funds deposit activities, and providing specialized personal computer-based software that is used by direct response merchants in connection with the entry of customer card data and card transaction processing, pursuant to sections 2225.28(b)(2) and 2225.28(b)(14).

Other Interests

Banc One proposes to acquire the following interest of First USA:[22]

50 percent ownership interest in PHH/Paymentech, Wilmington, Delaware, a limited liability company that is a joint venture with Paymentech Fleet Services, Inc., a First USA subsidiary, and PHH Vehicle Management Services Corp., and thereby engage in providing credit card marketing, transaction processing and other services to organizations that operate fleets of vehicles, pursuant to section 225.28(b)(2).

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22. Banc One also proposes to acquire the inactive subsidiaries of First USA, however, Banc One has committed not to engage in any activities through these inactive subsidiaries without the prior approval of the Board or the Federal Reserve Bank of Cleveland.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED DECEMBER 12, 1997

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1394

September Term, 1997

Inner City Press, et al.,

Petitioners

v.

Board of Governors of the Federal Reserve System,

Respondent

Banc One Corporation,

Intervenor

BEFORE: Wald, Silberman, and Randolph, Circuit Judges

ORDER

Upon consideration of the motions to dismiss, the opposition thereto and the replies; and the motion for leave to file an amended petition for review, the oppositions thereto and the reply, it is

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ORDERED that the motion for leave to file an amended petition for review be denied. The inclusion, in a petition for review, of substantive arguments as to standing or the merits of a claim are neither required nor contemplated by the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 15. The supplemental affidavits addressing the question of standing, however, which were filed jointly with the motion for leave to file an amended petition and the opposition to the motions to dismiss, were properly filed and considered by the court. *See Northwest Environmental Defense Ctr. v. Bonneville Power Administration,* 117 F.3d 1520, 1527-28 (9th Cir. 1997) (allowing the filing of affidavits concerning appellate court's Article III jurisdiction, noting that: "[b]ecause Article III's standing requirement does not apply to agency proceedings, petitioners had no reason to include facts sufficient to establish standing as a part of the administrative record"). It is

FURTHER ORDERED that the motions to dismiss be granted, for the reasons stated in the opinion issued this date.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam

init/ DMW, LNS, ARR

APPENDIX D — COMMUNITY REINVESTMENT ACT 12 U.S.C. § 2901

* * *

§ 2901. Congressional findings and statement of purpose

(a) The Congress finds that —

* * *

(3) regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.

(b) It is the purpose of this title [12 USCS §§ 2901 et seq.] to require each appropriate Federal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.